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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-408

CITY OF MILWAUKEE, THE SEWERAGE COMMISSION OF THE CITY OF MILWAUKEE, and THE METROPOLITAN SEWERAGE COMMISSION OF THE COUNTY OF MILWAUKEE,

Petitioners,

vs.

PEOPLE OF THE STATE OF ILLINOIS and PEOPLE OF THE STATE OF MICHIGAN,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
For the Seventh Circuit

BRIEF AMICUS CURIAE OF THE METROPOLITAN WASTE CONTROL COMMISSION

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INTEREST OF AMICUS

Amicus curiae Metropolitan Waste Control Commission urges this Court to reverse the decision below to the extent it holds that a Federal District Court may proper-

ly order municipal governments to *eliminate* combined sewer overflows, without regard to considerations of economic reasonableness and feasibility, when the requirements of the District Court order are far more stringent than Federal statutory requirements for the *control* of combined sewer overflows.

Having found that serious problems of water pollution and sewage disposal could not be solved effectively and economically by individual units of Minneapolis/St. Paul area municipal government, Minn. Stat. §473.502 (1978), the Minnesota Legislature in 1969 established the Metropolitan Sewer Board, later re-named the Metropolitan Waste Control Commission ("MWCC"), to collect, treat, and dispose of sewage in this metropolitan area. The MWCC is charged with responsibility for sewage treatment and disposal in a seven-county area which includes Minnesota's two largest cities. MWCC serves 101 individual municipalities and a population of approximately two million people (half of Minnesota's residents) in this region of about 3,000 square miles.

The MWCC service area includes three major watersheds, the Mississippi, Saint Croix, and Minnesota Rivers. Ultimately, all effluents and combined sewer overflows from MWCC outfalls enter the Mississippi River, which forms the boundary between the States of Minnesota and Wisconsin downstream of St. Paul. In compliance with its statutory mandate, MWCC operates 17 wastewater treatment plants; 320 miles of interceptor sewers; and numerous ancillary facilities and equipment. The largest single facility, the Metropolitan Wastewater Treatment Plant ("Metro Plant"), provides sewage treatment

for approximately 1,500,000 Minnesotans, more than a third of the State's population. The facility, which discharges to the Mississippi River, has a design flow of 250 million gallons per day.

Originally Minneapolis and St. Paul, and suburban South St. Paul, were served by a combined sewer system: one explicitly designed, before the advent of modern wastewater collection and treatment concepts, to serve the dual function of conveying both sewage and stormwater flows. Although much of the Minneapolis system (and parts of the St. Paul and South St. Paul systems) has been converted to separate storm and sanitary sewers since 1933, a substantial fraction of these urban areas is still served by a combined system. As a result, during high-rainfall periods overflows from these combined sewers must still be diverted to the Mississippi River.

As *amicus curiae*, the MWCC here addresses the single issue of greatest potential impact on its immediate and future operations. MWCC is currently nearing completion of a $270 million expansion of the Metro Plant designed to meet the "secondary treatment" requirements of the Federal Water Pollution Control Act Amendments of 1972, as amended ("FWPCA"), 33 U.S.C. § 1251 *et seq.*, and implementing regulations of the United States Environmental Protection Agency ("EPA"), 40 C.F.R. Part 133. In addition, the MWCC has recently completed extensive planning studies pursuant to section 201 of the Act, 33 U.S.C. § 1281, at a cost of more than $3 million, for the construction of facilities to control combined sewer overflows ("CSO"). Implementation of this CSO control plan is expected to commence in 1981.

The decision below, requiring "elimination" of combined sewer overflows on an asserted Federal common law basis, imposes a burden on the metropolitan Milwaukee area far in excess of the obligations imposed by Congress under the FWPCA. The MWCC is greatly concerned by the potential effect of this decision, as it appears that the MWCC's careful and expensive planning already accomplished may result only in illusory compliance with MWCC's legal obligations. Metropolitan Milwaukee and the service area of the MWCC are in similar geographic circumstances, in the sense that their effluent and overflow discharges reach major interstate waters. A large number of other major sewerage agencies across the nation face the same dilemma. The decision below, if not reversed, will have a national economic impact with few parallels in American history.

The issues presented by the case at bar will of course be addressed by the parties; but the relief sought by Respondents is specific to the Lake Michigan area. The MWCC here seeks to demonstrate the much broader effect the decision below, if permitted to stand, will have on other agencies with a legislative charge similar to that of the Petitioner.

The headquarters office of the Metropolitan Waste Control Commission is 350 Metro Square Building, St. Paul, Minnesota 55101. Written consent of the parties to the filing of this brief *amicus curiae*, pursuant to Rule 42, paragraph 2, is hereto appended (Appendix C).

The case at bar presents a legal issue of vital concern directly affecting the MWCC.

QUESTION PRESENTED

Whether a court may order municipal governments to *eliminate* combined sewer overflows on the basis of a supposed principle of Federal common law, without regard to the costs of compliance with the court's order, when the requirements of the order are far more stringent than the uniform requirements of Federal statutes mandating the *control* of combined sewer overflows.

ARGUMENT

I.

The abatement of water pollution associated with combined sewer overflows can be rationally achieved only if municipal governments are guided by uniform national policy established by the United States Environmental Protection Agency, exercising its expertise and authority delegated by Congress.

During the past five years the United States Environmental Protection Agency (EPA), pursuant to Congressional delegation of authority in the FWPCA (P.L. 92-500, as amended by P.L. 95-217), has fostered a nationwide program for the planning and construction of combined sewer overflow (CSO) control facilities. Implementation of this program will require operating authorities of municipal sewer systems to expend vast amounts of public funds. CSO control projects are eligible for Federal grant assistance up to 75 percent of costs for feasibility studies, design, and construction. FWPCA § 202(a)(1), 33 U.S.C. § 1282(a)(1) (Supp. I, 1979).

EPA has articulated its CSO control program to municipal authorities in a continuum of publications establishing a broad, uniform national policy. (Appendix A.) The cornerstone document is Program Requirements Memorandum 75-34 (hereinafter "PRM 75-34"), issued December 16, 1975. (Appendix B.)

In 1975, the MWCC obtained National Pollutant Discharge Elimination System (NPDES) permits, pursuant to the FWPCA, allowing the discharge of CSO to the Mississippi River from St. Paul area combined sewer systems. One condition of these permits required studies of CSO-related problems in the MWCC's service area; the Petitioner's NPDES/WPDES permits contained a similar provision. In January 1976, the MWCC submitted a grant application to EPA for funding of the required CSO control studies pursuant to FWPCA § 201, 33 U.S.C. § 1281 (1976 and Supp. I, 1979).

During September 1976, MWCC issued a request for proposal to several firms of consulting engineers, outlining the facilities planning study which would be required to determine the most feasible methods of controlling CSO pollution. MWCC's request for proposal was based in large part on the EPA policy summary contained in PRM 75-34. Paramount to this study were requirements that the CSO control program be consistent with EPA-established criteria for preservation of water quality, effluent standards, and applicable program directives, including (*inter alia*) establishment and development of the CSO control program in coordination with EPA and the Minnesota pollution Control Agency (MPCA).

The study is now substantially complete, at a cost to the taxpayers of more than $3 million for the facilities plan alone; it contemplates expenditures in the area of $300 million for CSO control, with implementation commencing in 1981. Failure of this Court to reverse the holding below, which required total "elimination" of Milwaukee's overflow discharges, would throw this entire carefully planned project into a cocked hat. Because it is impossible to predict at what point subsequent litigation might be commenced, it is quite conceivable that totally completed CSO *control* projects would be challenged, and total "elimination" of CSO required.

The marginal benefits of a CSO control program purporting to require total overflow elimination would be unfundable, because of excessive marginal costs, under the terms of PRM 75-34 and FWPCA § 217, 33 U.S.C. § 1297 (Supp. I, 1979). Implementation of any such program would require comprehensive revision of the facilities plans, and would result in years of delay and expenditure of hundreds of millions of public dollars, for negligible and indeed hypothetical benefits. It is inconceivable that any such result would reflect the intent of Congress.

The courts below have required that Petitioner totally "eliminate" CSO discharges. Total elimination is an impossibility, statistically and technically, both in theory and in practice. The District Court fallaciously distinguished control from total elimination. To comply with the District Court's order, Petitioner will have to design facilities to capture and treat combined sewer flows associated with the most severe storm for which it has historical data. But would this result in total "elimination" of CSO?

Absolutely not! Designing treatment works capacity for anticipated future events is a strictly statistical exercise. The occurrence of "error," based on statistical variability of natural events, is a mathematical certainty. Thus if facilities are designed to cope with a storm that statistically occurs once every hundred years, a storm of one in two hundred year severity will create conditions with which the facility cannot cope. This principle cannot be brushed aside, because another operative mathematical certainty is that the 200-year storm may possibly occur in two consecutive years.

For example, the MPCA requires that the MWCC's huge Metro Plant facility now under expansion, whose purpose is to provide full treatment only for dry weather sewage flows, be designed to protect Mississippi River water quality at the lowest river flow volume statistically occurring for seven consecutive days once in ten years. In engineering nomenclature, this flow is called the 7Q10; it is the design receiving water flow for all sewage treatment plants in Minnesota, and most plants nationwide. Notwithstanding that the 7Q10 is well established (by application of statistical principles to historical data) as an event with only a once-in-ten-year probability of occurrence, it has recently occurred two years in a row, 1976 and 1977, at St. Paul. Analysis of CSO pollution problems in terms of total "elimination" simply ignores the most rudimentary engineering and statistical principles. The goal of "elimination" is nothing more than an illusion unless one is prepared to design for the flood Noah encountered; and even that design, in terms of mathematical theory, is only one for control as opposed to elimination.

Another anomaly which emanates from the decisions below is that the required treatment works design is for a statistical storm interval substantially longer than the life expectancy of the facilities. 40 C.F.R. Part 35, Appendix A, 6g(1), provides:

> The treatment works useful life for a cost-effectiveness analysis shall be as follows:
> Land—permanent.
> Waste water conveyance structures (includes collection systems, outfall pipes, interceptors, force mains, tunnels, etc.)—50 years.
> Other structures (includes plant building, concrete process tankage, basins, lift station structures, etc.)—30-50 years.
> Process equipment—15-20 years.
> Auxilliary equipment—10-15 years.

This means, of course, that the courts below have required facility design to accommodate a storm that (as a statistical probability) will not occur during the life of the facility. Inescapably, design engineers must deal with CSO control, not with its elimination.

The geographic circumstances of the MWCC and of Milwaukee are far from unique. Most CSO discharges come from major metropolitan areas, and most CSO discharges reach interstate waters. A list of cities with similar geographic circumstances to the MWCC and Milwaukee would include Washington (D.C.), Chicago, Kansas City, Louisville, Detroit, Omaha, St. Louis, Philadelphia, Buffalo, New York City, Portland (Oregon), Rochester (New York), Cincinnati, Cleveland, and Toledo. Suits against the MWCC asserting Mississippi River pollution have been repeatedly threatened; indeed, the State of Wis-

consin has recently served a notice of intent to sue under the FWPCA. It is patently absurd to state, as has Respondent Illinois, that the decision below will not "open the floodgates" of litigation. (Response of the State of Illinois to the Briefs *Amicus Curiae* of the Mid-America Legal Foundation *et al.*, at 12.) Those dischargers who adhere strictly to EPA directives in constructing CSO control projects will be at the mercy of anyone located downstream. If this Court fails to reverse, the case at bar will provide a weapon for those seeking the illusory goal of total CSO "elimination," even of discharges caused by storms statistically occurring only once in a hundred years or longer. Literally billions of dollars of the taxpayers' money will be needed to protect against eventualities that may occur once in a lifetime, if indeed that often.

If the ruling below stands, *amicus* MWCC would be logically justified in suspending all CSO control efforts until sued. After the courts have resolved the issue, *and only then*, could MWCC proceed with any certainty to spend whatever is required to solve the problem. But even then, as circumstances change, yet another judge presiding over another suit against the MWCC (or any other sewage treatment authority) might provide another remedy for another plaintiff. A judge applying the Federal common law, as the District Court perceived it in this case, may order construction of separation, storage, and treatment systems to protect against a once in ten year storm. Of course, this may require a design employing entirely different and far more extensive (and expensive) facilities than those now planned. That completed, another judge in a subsequent case, perhaps in a different district and circuit, might order total "elimination" of CSO,

as did the District Court in the case at bar. Now, still another design and new engineering concepts will be needed. And if the courts below are correct, absolutely no consideration need be given to the hundreds of millions, even billions, of dollars that slip away in the process. This Draconian scenario may seem strained at first reading; but it is indeed possible, in fact probable, should the decision below remain law. It is essential that the Court resolve this apparent conflict between Federal common law and Federal statutes and regulations, so that those intimately affected may confidently proceed to solve the problems of CSO pollution.

The Court of Appeals would have reached a far more practical and equitable result had it applied the same analysis to CSO control as it did to effluent limitations. Just as the circuit court applied explicit statutory provisions regarding secondary treatment of plant effluents, it would then have applied relevant EPA directives and FWPCA § 217, 33 U.S.C. § 1297 (Supp. I, 1979), to the facts about Milwaukee's CSO problem. The court below chose rather to apply a "black or white" analysis. FWPCA §217 explicitly requires *cost effective* control, with marginal benefits that demonstrably justify the marginal costs. The issue is not, as the court below characterized it, whether raw sewage resulting from CSO should be discharged to public waters. The issue is the *extent* to which municipal dischargers should be required to *control* CSO pollution. EPA policy does not, by any reading, support unrestricted CSO discharges as an acceptable long-range solution.

The Court of Appeals, in support of its reversal of the District Court's effluent limitations, cites a report to Con-

gress by the Comptroller General for the proposition that "several cities began construction of advanced waste treatment facilities without adequate consideration of the expected costs and benefits of such facilities." *Illinois v. Milwaukee*, 599 F.2d 151, 175 (7th Cir. 1979). These same types of questions, in the context of CSO control, are raised in another and more recent General Accounting Office publication, *Report by the Comptroller General of the United States: Combined Sewer Flooding and Pollution—A National Problem; The Search for Solutions in Chicago*, CED 79-77 (May 15, 1979). This report, an in-depth analysis of Chicago's multi-*billion* dollar program to control (*not eliminate*) CSO, raises the principal question whether the level of control targeted is actually worth its projected costs—and whether in any event the nation can afford to pay those costs.

None will question the conclusion of the courts below that unrestricted discharges of raw sewage pose "significant risk." But because total elimination of CSO is a mathematical impossibility, some degree of risk is inevitable. It does not follow, from the fact that the risk of unrestricted discharges is "significant," that only control levels closely approaching total elimination will reduce this risk to acceptable levels.

II.

Federally mandated and funded projects for the control of combined sewer overflows are required by Federal law to be cost effective. The court below erred in disregarding considerations of economic reasonableness and feasibility and requiring the total elimination of Petitioner's combined sewer overflows.

To ignore costs, on these facts, is to bury one's head in the sand. EPA recognized in 1978 that if sewer separations were carried out for all combined systems, the cost would exceed $100 billion. R. Wycoff, J. Scholl, and S. Kissoon, *1978 Needs Survey: Cost Methodology of Control of Combined Sewer Overflows and Stormwater Discharge*, U.S. EPA Report EPA-430/9-79-003 (February 1979).

The United States has only finite resources to allocate to the CSO control problem. In its report to Congress of October 1, 1978, EPA states (at 8-11):

> It must be remembered that any increase in spending for combined sewer overflow control needs . . . will result in a decrease in spending for all other pollution control needs. . . . These tradeoffs must be weighed carefully for any given municipality. It is believed that this site-specific examination of pollution control tradeoffs can best be accomplished in a timely fashion under the present law.

In PRM 75-34 (Appendix B hereto), EPA summarizes its policy to assure that "projects are funded only when careful planning has demonstrated that they are cost effective." A key provision of PRM 75-34, in the context

of the total CSO "elimination" requirement imposed by the courts below, is found in paragraph I.D.4.: one of the "criteria for project approval" is that the "marginal costs are not substantial compared to marginal benefits." PRM 75-34 further requires: "Dollar costs should be compared with quantified pollution reduction and water quality improvements."

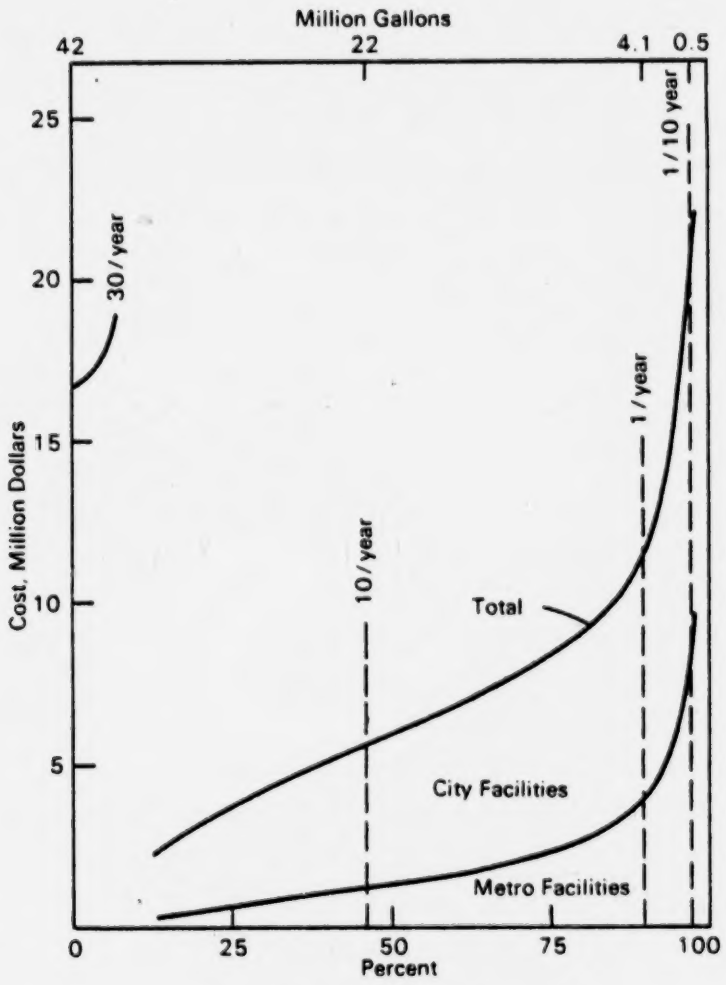
Last year EPA published *Benefit Analysis for Combined Sewer Overflow Control*, EPA-625/4-79-013 (April 1979). The introduction states in part:

> This publication is intended for the use of elected officials of municipalities served by combined sewers, their technical staff members, and their consultants. * * * [T]he subject of benefit analysis is uniquely important to anyone contemplating combined sewer overflow controls because of the nature of the overflows themselves, the distribution of combined sewer systems in the nation, the regulations governing the use of [EPA] construction grant moneys for this purpose, and the potentially high cost of corrective measures.

EPA's cost/benefit analysis policy is graphically illustrated in a case study of the City of Seattle, in the same publication at page 44:

> For each of the overflow areas, a plot of cost versus control level was made utilizing data developed in the control level optimization. . . . In all cases, a pronounced "knee," (indicating a dramatic increase in control costs) was indicated in the one-per-year to one-per-ten year overflow limit range. This knee of the curve is significant because it represents a point where marginal costs begin to increase quite rapidly. In other words, the cost for each additional unit

of pollution control above the knee is much greater than the cost for a comparable increment below it. EPA examines this relationship critically in deciding whether marginal costs are substantial in comparison to marginal benefits.



Cost-Overflow Control Curve

This curve, with its abrupt "knee," is typical of the marginal cost/marginal benefit relationships encountered in CSO control analysis across the nation. It is reasonable to infer that the curve for Milwaukee would be substantially similar; the curve for Minneapolis/St. Paul has been demonstrated in fact to *be* substantially similar. The MWCC's facility plan addressed the problem of selecting as a control level the annual overflow volume reduction that will intersect the "bend in the knee." Put simply, reductions of annual overflow volume beyond this point require in almost all cases an unjustifiable allocation of resources by comparison to the benefit received. As the Seattle graph demonstrates, increasing control from one overflow per year to one overflow per ten years approximately doubles the cost, but increases annual volumetric reduction of overflow only from approximately 90% to 97%. The precipitous, near-vertical rise at the end of the curve indicates that an approach to "elimination" of CSO could be achieved only at costs far exceeding the benefits derived.

As the District Court found, virtually all CSO discharges contain pathogenic organisms. This is a national problem, which requires for its solution a fair allocation of the nation's resources. The Chicago CSO study, as well as the entire body of EPA literature on the subject, recognizes that the funding burden required for near-total CSO elimination would cause an economic impact probably beyond the nation's ability to sustain. In any event, attempts at total elimination of CSO would not be a fair allocation of the nation's resources, considering the small benefits obtained by comparison to the costs. EPA's *Benefit Analy-*

sis for Combined Sewer Overflow Control further counsels, at pages 11-12:

> Selecting the storm conditions (frequency and intensity of storms in a year) around which a control system or facility will be developed is intimately involved in the whole process of determining water use objectives to be achieved through combined sewer overflow controls. The size of control facilities and therefore capital and operating costs can be directly related to the design condition. Financial and technological feasibility, achievable levels of benefits, and public acceptability of the local financial portion of the costs all depend on the design condition selected.
>
> Therefore, early in the benefit selection process, the idea of acceptable risk should be introduced since it will be important when design conditions are set and if any adjustment of the package of desired benefits is made necessary by unacceptably high estimates of costs. Here the aim is to determine the level or range of levels of acceptable beneficial use. Though ideal goals often cannot be reached because of limited funds, it is not always essential that they be achieved anyway [*sic*].

Because risk cannot be completely eliminated even in theory, "acceptable risk" (the level of which must be selected by facilities planners) is a concept mandated by economic and social conditions. Employing climatological data in the MWCC's service area, facility planners for the *amicus* are designing for a storm likely to occur once in a six-month interval. This is consistent with the design criteria suggested by *National Evaluation of Combined Sewer Overflows and Urban Stormwater Discharges*, EPA-600/2-77-064, 600/2-77-064a (1977). To require

Petitioner totally to "eliminate" CSO actually requires facility design for a storm which may not occur more than once every hundred years or so. MWCC facility planners have informally estimated that this level of design would increase costs threefold, raising MWCC service area CSO control costs into the billion-dollar range—and would result in an additional annual volumetric CSO reduction of only five percent.

It simply is not sufficient to dismiss the FWPCA, as did the Court of Appeals, as nothing more than "an appropriate starting point." 599 F.2d 151, 165. The MWCC and thousands of other units of local government have relied on EPA cost effectiveness guidelines, and their underlying concepts, as the *sine qua non* of CSO control facilities planning. Facility plans being prepared, or (as in MWCC's case) already completed, call for the expenditure of billions of dollars on the basis of this reliance. FWPCA § 302(a), 33 U.S.C. § 1312(a) (1976), directly addresses the permissibility of effluent limitations more stringent than basic national requirements, where such limits are necessary to meet applicable standards of receiving water quality—a problem analogous to CSO control. Where imposition of such effluent limits is proposed, FWPCA § 302(b)(1), 33 U.S.C. § 1312(b)(1) (1976), requires "a public hearing to determine the relationship of the economic and social costs of achieving any such limitation . . . including any economic or social dislocation in the affected community . . . to the social and economic benefits to be obtained."

As section 302(b)(1) indicates, and as EPA has stated, pollution control is a system of trade-offs. Congress requires a reasonable relationship between socioeconomic

costs and benefits; this Court must likewise recognize the necessity for cost/benefit analysis in the construction of such vast facilities as those for CSO control. Properly to analyze cost/benefit relationships in the case at bar, the Court would of course need to know the costs themselves. The District Court held that cost was not a factor, effectively depriving both this Court and the Court of Appeals of essential information.

If any doubt remained as to Congressional intent (as interpreted by EPA in PRM 75-34), it was eliminated by the 1977 amendments to FWPCA, P.L. 95-217. FWPCA § 217, 33 U.S.C. § 1297 (Supp. I, 1979), now provides:

> Any guidelines for cost-effectiveness analysis published by the Administrator [of the EPA] under this title shall provide for the identification and selection of cost effective alternatives to comply with the objective and goals of this Act and sections 201(b), 201(d), 201(g)(2)(A), and 301(b)(2)(B) of this Act.

FWPCA § 201(g)(2)(A), 33 U.S.C. § 1281(g)(2)(A), applies *inter alia* to CSO control facilities. Congressional intent is crystal clear: cost effectiveness analysis is paramount. Such considerations appear, however, to have escaped the attention of the courts below.

This Court should, in any event, reverse even if it were unfettered by statute. Forcing the Petitioner (and future public defendants) to spend hundreds of millions of dollars of public funds, for hypothetical benefits not demonstrated to exist in practice, is contrary to equitable principles. Such a result can only lead those burdened by it to despair of ever hitting the target created by the nation's need to maintain an unpolluted environment.

CONCLUSION

Amicus MWCC stands at the threshold of implementing another gigantic community pollution control effort. It has been castigated as recalcitrant, and seeks to get on with solving CSO control problems in its service area. The great body of statutes, regulations, rules, directives, proclamations, and ordinances of Federal, State, and local governments create a complicated, but at least predictable, framework within which MWCC must operate. Environmental goals are elusive, but achievable—*if* the MWCC and the Petitioner can rely upon some degree of uniformity in the legal obligations to which they must respond. Because Congress sponsors the performance of those legal obligations through the grant funding process, Congress has provided a uniform (if complex) framework of statutes and regulations designed to assure that legislative intent is translated into practical results. Such uniformity becomes an illusion if the Federal courts are at liberty to ignore this statutory plan.

Respectfully submitted,

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APPENDIX A

Environmental Protection Agency Publications
Relating to CSO Control

1. H. H. Benjes, Jr., *Cost Estimating Manual—Combined Sewer Overflow Storage and Treatment,* U.S. EPA Report, EPA 600/2-76-286 (NTIS: PB-266-359) (Dec. 1976).

2. Environmental Research Information Center, *Benefit Analysis for Combined Sewer Overflow Control,* EPA 625/4-79-013 (Apr. 1979).

3. J. P. Heaney, "A Strategy for Integrating Storage Treatment Options with Management Practices," presented at EPA Technology Transfer Seminars on Combined Sewer Overflow Assessment and Control Procedures, 1978.

4. J. P. Heaney, W. C. Huber, and S. J. Nix, *Stormwater Management Model: Level I—Preliminary Screening Procedures,* U.S. EPA Report, EPA 600/2-76-275 (NTIS: PB-259-916) (Oct. 1976).

5. J. P. Heaney and S. J. Nix, *Stormwater Management Model: Level I—Comparative Evaluation of Storage Treatment and Best Management Practices,* U.S. EPA Report, EPA 600/2-77-083 (Apr. 1977).

6. J. A. Lager, "CSO Treatment Potential and Information Source for Small to Medium Sized Communities", presented at EPA Technology Transfer Seminars on Combined Sewer Overflow Assessment and Control Procedures, 1978.

7. J. A. Lager, W. G. Smith, W. G. Lynard, R. M. Finn and E. J. Finnemore, *Urban Stormwater Management and Technology: Update and User's Guide,*

U.S. EPA Report, EPA 600/8-77-014 (NTIS: PB-275-654) (Sept. 1977).

8. Municipal Environmental Research Laboratory, Office of Research and Development, U.S. EPA, *Areawide Assessment Procedures Manual*, Vol. I, II, and III. U.S. EPA Report, EPA 600/9-76-014 (Jul. 1976).

9. J. T. Rhett, "Program Requirements Memorandum, No. PRM 75-34", Water Programs Operations, U.S. Environmental Protection Agency (Dec. 16, 1975).

10. J. T. Rhett, "Program Requirements Memorandum, No. PRM 77-4", Water Programs Operations, U.S. Environmental Protection Agency (Dec. 16, 1976).

11. B. Turner, R. Holbrook, R. Corbitt, and R. Wycoff, *1976 Needs Survey: Summary of Technical Data for Combined Sewer Overflow and Stormwater Discharge*, U.S. EPA Report, EPA 430/9-76-012 (Feb. 1977).

12. U.S. Environmental Protection Agency, "Report to Congress on Control of Combined Sewer Overflows in the United States (MCD-50)" (1978).

13. R. Wycoff and M. Mara, *1978 Needs Survey: Continuous Stormwater Pollution Simulation System User's Manual*, U.S. EPA Report, EPA 430/9-79-004 (Feb. 1979).

14. R. Wycoff, J. Scholl, and S. Kissoon, *1978 Need Survey: Cost Methodology for Control of Combined Sewer Overflow and Stormwater Discharge*, U.S. EPA Report, EPA 430/9-79-003 (Feb. 1979).

APPENDIX B

United States Environmental Protection Agency
WASHINGTON, D.C. 20460

Dec. 16, 1975

Program Requirements Memorandum PRM No. 75-34
Program Guidance Memorandum PG-61

SUBJECT: Grants for Treatment and Control of Combined Sewer Overflows and Stormwater Discharges

FROM: John T. Rhett, Deputy Assistant Administrator for Water Program Operations (WN-546)

TO: Regional Administrators
Regions I - X

This memorandum summarizes the Agency's policy on the use of construction grants for treatment and control of combined sewer overflows and stormwater discharges during wet-weather conditions. The purpose is to assure that projects are funded only when careful planning has demonstrated they are cost-effective.

I. *Combined Sewer Overflows*

A. *Background*

The costs and benefits of control of various portions of pollution due to combined sewer overflows and by-passes vary greatly with the characteristics of the sewer and treatment system, the duration, intensity, frequency and areal extent of precipitation, the type and extent of development in the service area, and the characteristics, uses and water quality standards of the receiving waters. Decisions on grants for control of combined sewer overflows, therefore, must be made on a case-by-case basis after detailed planning at the local level.

Where detailed planning has been completed, treatment

or control of pollution from wet-weather overflows and by-passes may be given priority for construction grant funds only after provision has been made for secondary treatment of dry-weather flows in the area. The detailed planning requirements and criteria for project approval follow.

B. *Planning Requirements*

Construction grants may be approved for control of pollution from combined sewer overflows only if planning for the project has thoroughly analyzed for the 20 year planning period:

1. Alternative control techniques which might be utilized to attain various levels of pollution control (related to alternative beneficial uses, if appropriate), including at least initial consideration of all the alternatives described in the section on combined sewer and stormwater control in "Alternative Waste Management Techniques and Best Practicable Waste Treatment" (Section C of Chapter III of the information proposed for comment in March 1974).

2. The costs of achieving the various levels of pollution control by each of the techniques appearing to be the most feasible and cost-effective after the preliminary analysis

3. The benefits to the receiving waters of a range of levels of pollution control during wet-weather conditions. This analysis will normally be conducted as part of State water quality management planning, 208 areawide management planning, or other State, regional or local planning effort.

4. The costs and benefits of addition of advanced waste treatment processes to dry-weather flows in the area.

C. *Criteria for Project Approval*

The final alternative selected shall meet the following criteria:

1. The analysis required above had demonstrated that the level of pollution control provided will be necessary to protect a beneficial use of the receiving water even after technology based standards required by Section 301 of P.L. 92-500 are achieved by industrial point sources and at least secondary treatment is achieved for dry-weather municipal flows in the area.

2. Provision has already been made for funding of secondary treatment of dry-weather flows in the area.

3. The pollution control technique proposed for combined sewer overflow is a more cost-effective means of protecting the beneficial use of the receiving waters than other combined sewer pollution control techniques and the addition of treatment higher than secondary treatment for dry-weather municipal flows in the area.

4. The marginal costs are not substantial compared to marginal benefits

Marginal costs and benefits for each alternative may be displayed graphically to assist with determining a project's acceptability under this criterion. Dollar costs should be compared with quantified pollution reduction and water quality improvements. A descriptive narrative should also be included analyzing monetary, social and environmental costs compared to benefits, particularly the significance of the beneficial uses to be protected by the project.

II. *Stormwater Discharges*

Approaches for reducing pollution from separate storm-

water discharges are now in the early stages of development and evaluation. We anticipate, however, that in many cases the benefits obtained by construction of treatment works for this purpose will be small compared with the costs, and other techniques of control and prevention will be more cost-effective. The policy of the Agency is, therefore, that construction grants shall not be used for construction of treatment works to control pollution from separate discharges of stormwater except under unusual conditions where the project clearly has been demonstrated to meet the planning requirements and criteria described above for combined sewer overflows.

III. *Multi-purpose Projects*

Projects with multiple purposes, such as flood control and recreation in addition to pollution control, may be eligible for an amount not to exceed the cost of the most cost-effective single purpose pollution abatement system. Normally the Separable Costs-Remaining Benefits (SCRB) method should be used to allocate costs between pollution control and other purposes, although in unusual cases another method may be appropriate. For such cost allocation, the cost of the least cost pollution abatement alternative may be used as a substitute measure of the benefits for that purpose. The method is described in "Proposed Practices for Economic Analysis of River Basin Projects," GPO, Washington, D. C., 1958, and "Efficiency in Government through Systems Analysis," by Roland N. McKean, John Wiley & Sons, Inc., 1958.

Enlargement of or otherwise adding to combined sewer conveyance systems is one means of reducing or eliminating flooding caused by wet-weather conditions. These additions may be designed so as to produce some benefits

in terms of reduced discharge of pollutants to surrounding waterways. The pollution control benefits of such flood control measures, however, are likely to be small compared with the costs, and the measures therefore would normally be ineligible for funding under the construction grants program.

All multi-purpose projects where less than 100% of the costs are eligible for construction grants under this policy shall contain a special grant condition precluding EPA funding of non-pollution control elements. This condition should, as a minimum, contain a provision similar to the following:

> "The grantee explicitly acknowledges and agrees that costs are allowable only to the extent they are incurred for the water pollution control elements of this project."

Additional special conditions should be included as appropriate to assure that the grantee clearly understands which elements of the project are eligible for construction grants under Public Law 92-500.

APPENDIX C

(Telegram) May 28, 1980

Mr. Robert A. Hillstrom, Attorney
c/o Metropolitan Waste Control Commission
1330 Soo Line Building
Minneapolis, MN 55402

Re: City of Milwaukee *et al.* v. State of Illinois *et al.*, U.S. Supreme Court Docket #79-408

Dear Mr. Hillstrom:

Pursuant to Supreme Court Rule 42, paragraph 2, the State of Illinois hereby consents in writing to the filing of a brief *amicus curiae* on behalf of the Metropolitan Waste Control Commission in the above-captioned case.

Sincerely,

Joseph V. Karaganis, Attorney for the People of the State of Illinois

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(Telegram) May 28, 1980

Robert A. Hillstrom
Attorney for Metropolitan Waste Control Commission
1330 Soo Line Building
Minneapolis, MN 55402

Re: City of Milwaukee *et al.* v. State of Illinois *et al.*, United States Supreme Court Docket Number 79-408

Dear Mr. Hillstrom:

Pursuant to Supreme Court Rule 42, paragraph 2, the State of Michigan hereby consents in writing to the filing

of a brief *amicus curiae* on behalf of the Metropolitan Waste Control Commission in the above-captioned case.

Sincerely,

Thomas L. Casey
Assistant to Attorney General

QUARLES & BRADY
780 North Water Street
Milwaukee, Wisconsin 53202

May 28, 1980

Robert A. Hillstrom, Esq.
Hillstrom & Martinson, Ltd.
1330 Soo Line Bldg.
Minneapolis, MN 55402

Re: City of Milwaukee *et al.* v. State of Illinois *et al.*,
United States Supreme Court Case No. 79-408

Dear Mr. Hillstrom:

We hereby consent on behalf of the Metropolitan Sewerage Commission of the County of Milwaukee and the Sewerage Commission of the City of Milwaukee to the filing of a brief by the Metropolitan Waste Control Commission as *amicus curiae* in the above-captioned matter. We are also authorized and hereby consent to such filing by the City of Milwaukee.

Very truly yours,

QUARLES & BRADY
/s/ Richard W. Cutler